STATE OF MICHIGAN

COURT OF APPEALS

EDWARD GLADSTON ROSARIO PRAGASAM,

Plaintiff-Appellant,

v

CIENA HEALTH CARE MANAGEMENT, CIENA HEALTH CARE MANAGEMENT, INC., and SUNSHINE REHABILITATION SERVICES,

Defendants-Appellees,

and

JOSEPH METIAS, AMRIT GILL, and BENNET SAMUEL,

Defendants.

UNPUBLISHED
December 15, 2011

No. 298871
Oakland Circuit Court
LC No. 2009-099928-CZ

Before: MURPHY, C.J., and JANSEN and OWENS, JJ.

PER CURIAM.

Plaintiff, acting *in propria persona*, appeals as of right the trial court's order dismissing his action with prejudice as a discovery sanction under MCR 2.313. We affirm.

Plaintiff argues that the trial court erred when it dismissed his complaint for failure to comply with discovery requests. We disagree. "We review discovery sanctions for an abuse of discretion." *Thorne v Bell*, 206 Mich App 625, 633; 522 NW2d 711 (1994). A trial court abuses its discretion when its ruling results in an outcome that falls "outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

Caselaw suggests that as a pro se litigant, plaintiff is entitled to some leniency in pursuing his claims. See *Haines v Kerner*, 404 US 519, 520; 92 S Ct 594; 30 L Ed 2d 652 (1972) (allegations in pro se complaint are held "to less stringent standards than formal pleadings drafted by lawyers"). However, this leniency is not limitless, and the court rules must still be followed. *Bachor v Detroit*, 49 Mich App 507, 512; 212 NW2d 302 (1973). This includes Michigan's liberal discovery rules that allow for discovery regarding any matter, not privileged,

that is relevant to the subject matter of the pending action. MCR 2.302(B)(1); *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616; 576 NW2d 709 (1998). Trial courts are provided with various mechanisms to enforce discovery and to sanction disobedient parties, including the power to dismiss an action or to render a judgment by default. MCR 2.313(B)(2)(c); *Thorne*, 206 Mich App at 632. "Because the imposition of sanctions is discretionary, the trial court should carefully consider the circumstances of the case to determine whether a drastic sanction, such as dismissing a claim, is appropriate." *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 451; 540 NW2d 696 (1995).

In *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990), this Court provided a nonexhaustive list of factors for a trial court to consider when evaluating the appropriateness of a discovery sanction:

> (1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the defendant; (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice; (5) whether there exists a history of plaintiff's engaging in deliberate delay; (6) the degree of compliance by the plaintiff with other provisions of the court's order; (7) an attempt by the plaintiff to timely cure the defect[;] and (8) whether a lesser sanction would better serve the interests of justice. [Citations omitted.]

On the issue of whether noncompliance with a discovery order was willful, there need not be a showing that the discovery failure was accompanied by wrongful intent; it suffices if the failure was "conscious or intentional, [but] not accidental or involuntary." *Edge v Ramos*, 160 Mich App 231, 234; 407 NW2d 625 (1987).

Although plaintiff emphasizes his willingness to cooperate, the record provided to us[1] does not support this assertion. As described by the trial court, plaintiff was only willing to allow discovery if it was "according to his own schedule and under his terms," despite attempts by defendants and the trial court to reasonably accommodate plaintiff's demands. Defendants filed three proper notices to take plaintiff's deposition between November 2009 and April 2010. Each notice was rebuffed with a myriad of excuses that changed as discovery dragged on. Plaintiff's overarching concern was having to travel back to Michigan, which defendants addressed by agreeing to take his deposition either the day before or the day after a scheduled court hearing. Even this was unacceptable to plaintiff, who criticized defendants for doing this.

[1] Plaintiff did not provide this Court with transcripts for any of the hearings that were held in this matter, which he was required to do under MCR 7.210(B)(1). This obligation "applies regardless of whether the transcript is directly relevant to the issues on appeal." *Thompson v Thompson*, 261 Mich App 353, 359 n 1; 683 NW2d 250 (2004). "A party may not unilaterally make the determination that less than the full transcript of all proceedings is required for the appeal." *Myers v Jarnac*, 189 Mich App 436, 444; 474 NW2d 302 (1991). We will not find error below when review of a transcript is necessary to resolve an argument posed by the party seeking review who failed to procure the transcript as required by the court rule. *Id.*

However, he fails to acknowledge that defendants were attempting to be flexible for his benefit. It was not until April 2010 that plaintiff finally appeared for his deposition in the court's jury room. The courthouse closed for the day before the deposition was completed, so the arduous process began anew. Although defendants filed a notice to continue plaintiff's deposition, plaintiff informed defendants that he was unavailable on the scheduled day without further explanation. With a few weeks left of discovery, defendants filed their third motion to dismiss when plaintiff refused to provide his availability or location preference for the continued deposition.

While plaintiff's intent may not have been wrongful, his violations were intentional and plagued this action from the very beginning. He made a conscious decision not to appear for his properly noticed depositions, which alone is grounds for dismissal under MCR 2.313(D)(1)(a). Instead of correcting the defect, he spurned nudges by the trial court and defendants to gain his compliance. Although plaintiff partially complied with some of the court's discovery orders, his behavior exhibited an unwillingness to accommodate defendants' right to discovery. Based on plaintiff's history, the trial court did not abuse its discretion when it concluded that there was no other viable option and dismissed the action under MCR 2.313(B)(2)(c).

Plaintiff also argues that the trial court should have held a hearing before dismissing his claim. This assertion is without merit. The record indicates that a hearing was held in the matter on May 5, 2010; however, plaintiff failed to provide a transcript of this hearing for our review. Without the transcript, we rely on the trial court's indication that oral arguments were heard. *Harvey v Gerber*, 153 Mich App 528, 531; 396 NW2d 470 (1986). Plaintiff was also provided additional time to file a response brief. Plaintiff had a full opportunity to respond to defendants' motion; therefore, his due process rights were not violated. See *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995).

Furthermore, defendants' motions to compel were not frivolous. Plaintiff claims that defendants filed the motions to compel in retaliation against his initiation of appellate proceedings. However, the record does not support his assertion. The motion to compel, which was filed after plaintiff prematurely initiated a claim of appeal, sought discovery of additional recordings that plaintiff admitted during the first portion of his deposition he still had in his possession but had not given to defendants. These recordings contained conversations between plaintiff and defendants' agents, which are discoverable under Michigan's open and broad discovery policy. *Reed Dairy Farm*, 227 Mich App at 616. Thus, the motion to compel was not frivolous.

Next, plaintiff argues that defendants' motion to dismiss was moot because the trial court could no longer fashion a remedy after it denied the earlier motion to dismiss. This argument also lacks merit as nothing in the Michigan Court Rules prohibited defendants from renewing their motion if the violations continued. By denying the first motion to dismiss, the trial court was giving plaintiff the opportunity to continue pursuing his action. It was only when he did not change his behavior and further inhibited discovery that the trial court ultimately granted defendants' motion to dismiss.

Plaintiff also argues that the trial judge should have been disqualified. "[T]o preserve for appellate review the issue of a denial of a motion for disqualification of a trial court judge, a

party must request referral to the chief judge of the trial court after the trial court judge's denial of the party's motion." *Welch v District Court*, 215 Mich App 253, 258; 545 NW2d 15 (1996); see also MCR 2.003(D)(3)(a). Here, plaintiff failed to preserve the issue. Moreover, plaintiff's argument lacks merit. He alleges discriminatory and fraudulent conduct, basing his complaint on a hearing that culminated in an order compelling plaintiff to produce his educational records, among other items. Without the transcript for this hearing, we cannot discern whether there were any discriminatory remarks, and merely ordering a party to produce discoverable materials does not establish discrimination. Furthermore, the record indicates that the trial court gave plaintiff numerous chances to pursue his action before ultimately dismissing the action, which is entirely inconsistent with his allegations of discrimination.

Plaintiff's claim of fraudulent conduct on the part of the trial judge is based on the amended scheduling order issued by the judge after the case was reassigned from another circuit court judge. A slight discrepancy in scheduling orders relative to a final pretrial conference, which forms the basis for plaintiff's argument, does not establish fraudulent conduct. This argument is wholly lacking in merit.

Affirmed. Defendants, having fully prevailed on appeal, are awarded taxable costs under MCR 7.219.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Donald S. Owens